1989

Utah Department of Transportation v. Walter M. Ogden, et al., Rulon Lind, et al., Laygo Company, et al., J.D. Springer : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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UTAH DEPARTMENT OF TRANSPORTATION,	:	
Plaintiff-Appellant,	:	
vs.	:	Case No. 890173
WALTER M. OGDEN, et al., RULON LIND, et al., LAYGO COMPANY, et al., J.D. SPRINGER,	:	(Priority No. 10)
Defendants-Respondents.	:	

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REPLY BRIEF OF PLAINTIFF-APPELLANT

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APPEAL FROM A JUDGMENT
OF THE SEVIER DISTRICT COURT
THE HONORABLE DON V. TIBBS
DISTRICT JUDGE

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INTRODUCTION

This Reply Brief of the Plaintiff-Appellant (hereinafter "Appellant") is intended to reply to new matters raised in the Defendants-Respondents' (hereinafter "Respondents'") Brief. This Reply Brief is therefore not an exhaustive analysis of the Appellant's arguments on appeal; but is to be read together with the Appellant's Briefs on file herein. Please note that this Reply Brief addresses all four cases on appeal herein (Ogden, Lind, Laygo and Springer), whereas there are two Appellant Briefs on file herein, one for Ogden and Lind prepared by Stephen C. Ward, Assistant Attorney General and one for Laygo and Springer prepared by Alan S. Bachman, Assistant Attorney General.

STATEMENT OF FACTS

Appellant (UDOT) relies upon its statement of facts as stated in the Appellant's Briefs on file herein. Respondents (Landowners) seem to list all components of the record of this case for almost half the length of their 69 page "Brief". To the extent Respondents' statement of facts conflict with those of the Appellant, the Appellant contends that the Respondents recitation of facts are in error. Some of those specific errors need further explanation as provided hereinbelow.

1. Appellant objects to the inclusion in Respondents' Brief at pages 6 and 36-38 of any matters pertaining to the

Partington trial which the trial court ruled inadmissible. Though Respondents claimed to have proffered the evidence to protect their record on appeal, Respondents failed to cross-appeal in order to raise their contention that such evidence should have been considered by the trial court. Therefore, it is impermissible for Respondents to have that inadmissible evidence in their Brief or to be considered by this Court.

2. Contrary to the Respondents' assertion on P. 7 of their Brief, the reference by Appellant to the lack of the Respondents raising the issue of the valuation date in their answer, in the immediate occupancy process, or even in the pretrial conferences, is of course, relevant to the issue of whether Respondents timely raised this issue.

3. In regard to the particular subject properties, the Appellant's Briefs describe the portions of the record and transcript which rebut many of the statement made by Respondents in their statement of facts. For instance Exhibit "I" and 48 in the record demonstrate that the Ogden property was in excess of a 45% grade. The record referred to in Appellant's Briefs refers to the lack of ripeness of the properties for urban development and the lack of "follow-through" of the Laygo Respondent-Defendants to develop their property; all of which need not be repeated here in this Reply Brief.

ARGUMENT

POINT I

RESPONDENTS DID NOT INTRODUCE SUBSTANTIAL EVIDENCE UNDER THE FRIBERG CASE FOR CHANGING THE VALUATION DATE.

Despite all the discussion by the Respondents of State Com'n v. Friberg, 687 P.2d 821 (Utah 1984), Respondents failed to properly address the key test provided in that case for changing the valuation date. The Friberg decision creates a rebuttable presumption that the valuation date is the date of service of process and, in essence, places the burden of proof on the proponent of a changed valuation date. It further states that "to rebut that presumption, the unfairness of valuing property as of that date must be evident and the difference in value must not be insignificant." Friberg, supra, at 831-832 (emphasis added).

What is the significant change in value that Respondents wish to assert? What significant change in value did the trial court find? What was the highest and best use of the subject properties in 1977 as required by Utah law in order to determine valuation? State Road Commission v. Wood, 22 U.2d 317, 452 P.2d 872 (1969). Was speculative assembling of the properties needed to have an urban use of the properties? Did comparable land prices change significantly from 1977 to 1987? If so, what was that change? Where are these questions answered

in Respondents' Brief? The Respondents have failed to show any significant change in value of the subject properties from the 1987 valuation date to 1977. This is the first step under Friberg, supra. Respondents do argue that changes in the development market existed between 1977 and 1987. However, condemnation valuation is concerned with just compensation and the fair market value of the property between a willing buyer and willing seller. State v. Peterson, 12 Utah 2d 317, 366 P.2d 76 (1961). If the landowners can receive a fairly similar price for their property in 1977 and 1987, regardless of the development costs differential to the purchaser, then their has not been a substantial change in value that would cause a change in the valuation date under Friberg, supra. In other words, since the appraisal evidence, as introduced by the State before the trial court, indicates that the 1977 and 1987 fair market values of the subject properties are not significantly different, then the evidence relied upon by Respondents that it costs more to develop in 1987 is inconsequential. The only relevant consequence is if willing seller-willing buyer transactions from 1977 to 1987 indicate that the fair market value of the subject properties has significantly declined from 1977 to 1987.

Therefore, in the absence of any showing of a significant change in value (fair market value) between 1977 to 1987, the trial court had no basis for changing the valuation

date from the statutory service of summons date.

Even if Respondents were to meet the initial test of Friberg, supra, by showing a significant change in value from 1977 to 1987, Respondents have failed to show that their properties were ripe for the type of urban development in 1977 that they wish to espouse. Respondents have failed to show that utilities were reasonably available to the properties in 1977; have failed to show that the landowners pursued development of their properties; and have failed to show that the City had any adopted law or regulation (which would have been required) which precluded development of the properties because of a potential freeway. (These matters and the appropriate parts of the Record are discussed in the Appellant Briefs). Mr. McIff, before the trial court, testified that certain of the properties could be assembled together to become developable. That testimony was allowed by the trial court in error as it is speculative evidence, as discussed in the Appellant Briefs. State v. Jacobs, 16 Utah 2d 167, 397 P.2d 463 (1964). Respondents did not even *address this issue or the cases cited therein, in their Brief.*

Respondents cite cases from other jurisdictions in an effort to bolster support for their argument that the valuation date should be changed. None of these cases help the Respondents.

Respondents rely on Bd. of Cty. Com'rs v. Delaney, Col. App., 592 P.2d 1338 (1978). That case, however, discussed an irrigation ditch that was replaced and an allowance of repair evidence after the date of "take". The Colorado Court of Appeals noted that though the cost of repairs was compensable "... it is unfair to restrict these costs to any period of time before the condemnee received title to the easement." Delaney, supra at 1340. This case is not relevant to the current fact situation and does nothing to show that Respondents should have a 1977 valuation date.

Respondents then cite State v. Hollis, 179 P.2d 750 (Ariz. 1963). Hollis requires that conditions caused by a condemnation not be used to reduce value. The Arizona Supreme Court in Hollis determined that a lease which would have continued in effect if not for the highway project, could still be considered to determine value. UDOT would agree with this decision and acknowledges that with the use of the 1987 valuation date, any specific conditions caused by the condemnation activities of UDOT can not be used to lower the value of the Respondents' properties. No change in the valuation date is needed to allow into evidence, leases or other transactions that would have existed but for the condemnation.

Respondents cite Udovich v. Arizona Board of Regents,

9 Ariz. App. 400, 453 P.2d 229 (1969). That case actually aids the Appellants herein. Uvodich involves a counterclaim (which Respondents here failed to file) in order to contend a previous taking occurred. Like the Hollis case, the Court held that the landowner was still free to show any depreciation in value due to the condemnation.

Respondents cite City of Sparks v. Armstrong, 748 P.2d 7 (Nev. 1987). That case states that:

> Substantial evidence was presented to establish that the 1972 Sparks actions with regard to the tentative subdivision plan made it clear that future development on such parcels would not be permitted. Although the mere planning of a project is generally insufficient to constitute a taking, when precondemnation activities of the government become unreasonable or oppressive in such a manner that those activities adversely affect the market value of the property, then the property owner is entitled to compensation. [City of Sparks, at 8]

In the subject cases, the properties did not have development plans that were denied by UDOT. In fact, no such developments were presented, and if they were, it would have been the local government that would have reviewed the plans, not UDOT. In the subject cases as indicated in the Appellant's Briefs, the properties were not ripe for development in 1977 or the property owners did not actively pursue development. As discussed on Page 24 of the Laygo/Springer Appellant's Brief, in

the only property that was ripe for development in 1977, Laygo, the property owners did not even develop the portion of their property that was unaffected by the proposed freeway and also did not coordinate with UDOT, when such help was offered, to delineate the area of their property that UDOT would not be interested in, even if funding were later to be available. In any event, if the property owners would have so developed in 1977, U.C.A. §78-34-4 (1987) would have required UDOT to pay for such improvements to the subject property made before the service of summons.

Respondents cite Com., Dept. of Transp. v. DiFurio, 555 A.2d 1379 (Pa. Cmwlth. 1989). However, that case involves a condemnor actually sending a condemnation notice letter to the landowner as well as visits with the landowner's employees prior to formally filing the condemnation action. This is an unreasonable intrusion by the government. In the current situation, UDOT did nothing more than publicize the potential route in order that it could receive the proper public attention in order to assure that it is desired and located properly. It is not a disputed fact in this case that after funding was obtained, UDOT then pursued any notices of intent to condemn and the requisite condemnation actions. (Statement of Facts, Appellant's Briefs).

Respondents cite Lange v. State of Washington, 86 Wash. 2d 585, 547 P.2d 282 (1976). However, that case requires the State to manifest "its unequivocal intent to appropriate" the subject property. The Lange property owners instituted an inverse condemnation in an attempt to have their contention of precondemnation blight aired before the court. The court found, however, that:

> there was no evidence of intentional delay on the part of the State so as to obtain the property at a depreciated value. [Lange, at 284]

In the current case, the State of Utah had not manifested its unequivocal intent to appropriate the subject properties as it could not even had done so legally without funding. In fact, under Salt Lake County v. Ramoselli, 567 P.2d 182 (Utah 1977), UDOT could not have manifested an unequivocal intent until 1985, when funding was obtained for the subject project. This funding is necessary for UDOT to announce "its commitment to the project" which could require the use of a valuation date at that time. [See County of Clark v. Alper, 685 P.2d 943, 948 (Nev. 1984) which was relied upon in City of Sparks, supra, cited by Respondents]. Additionally, UDOT acted in good faith and there is no evidence that UDOT did anything to delay the condemnation process in order to take advantage of

declining property values. In fact, in 1977, UDOT would have had every reason to believe that property values would have increased and that it was in UDOT's interest to commence condemnation proceedings immediately, but for that fact that it would have been premature as funding was not available.

POINT II.

UTAH LAW CLEARLY ONLY ALLOWS PAYMENT OF INTEREST FROM DATE OF OCCUPANCY OR ENTRY ON PROPERTY.

Respondents are in error when they indicate that U.C.A. §78-34-9 has not been construed since Friberg, supra. The Utah Court of Appeals in Redevelopment Agency of Salt Lake City v. Daskalas, 119 Utah Adv. Rep. 70, (Ct. App. 10/11/89), a 1989 decision, found that the RDA did not occupy the Owners' property and that:

> under section 78-34-9, where there is no entry or occupation of the property by the condemning agency, there is no entitlement to interest.

The Daskalas case, being a 1989 case, is consistent with the following cases cited in Appellant's Briefs: City of So. Ogden v. Fujiki, 621 P.2d 1254 (Utah 1980), which held that the City did not occupy the property and therefore interest commenced from the date the final judgment was entered; State v. Peek, 1 Utah 2d 263, 265 P.2d 630 (1953), wherein even the issuance of a service of summons which interfered with the use of the property

did not constitute possession by the State and the awarding of interest would only run from the date of actual possession by the condemnor; and State v. Bettilyon, 17 Utah 2d 135, 405 P.2d 420 (1965), wherein the deferral of a subdivision plat did not constitute sufficient occupation of the property to commence interest.

Appellants respectfully request your court to uphold the long line of cases in Utah. The Friberg decision in no way indicates that the prior cases concerning this interest issue should be overturned. The Utah Court of Appeals indicates concurrence on this issue in the 1989 Daskalas decision.

In supporting their argument to have interest commence in 1977, Respondents argue that their lands were held "hostage" in 1977 and that there was a "defacto" taking in 1977. At the same time, Respondents attempt to argue that they had no claim that they could have presented against the State at that point in time. (This is discussed further, infra.) Of course, if the land was held hostage or if their was a defacto taking in 1977, then Respondents could have presented an inverse condemnation claim at that point in time. However, Respondents did not do so, and for good reason, since the land was not held hostage and there was no taking in 1977.

As discussed in the Appellant's Briefs, the evidence in

the record indicated that the land was not held hostage in 1977. Respondents conveniently fail to address a case raised on Page 25 of the Laygo/Springer Appellant Brief: Sproul Homes of Nevada v. State Ex. Rel. Dept. of Highways and County of Clark, 611 P.2d 620 (Nev. 1980). Though Respondents cite the City of Sparks, supra, Nevada case, that case is not on point since it involved the condemnor actually denying development on the owners land. It is the Sproul Homes case that is on point. Sproul Homes indicates that:

> Beyond the claimed entry for the purpose of surveying and appraising, there is no allegation of a physical invasion of its land. Nor is there any showing of finality regarding the state's proposed project. Indeed there is no allegation that the appellants's property will definitely be acquired for highway purposes. Sproul Homes, at 622 (emphasis added).

The Nevada Supreme Court therefore affirmed the dismissal of the inverse condemnation complaint. The current situation is similar to Sproul Homes and not City of Sparks. In the current situation, UDOT had no final plans in 1977 to acquire the subject properties. In fact, UDOT did not have funding approved until December, 1985. (Plaintiff-Appellant's Exhibit 65, Ogden R-64, Lind R-54, Laygo R-48 and Springer R-46). The cases at issue herein are therefore similar to Sproul Homes, supra.

Since the Respondents' properties were not "held hostage" by UDOT in 1977 and since UDOT did not occupy or enter

the properties at that time, the trial court erred in ruling that interest run from 1977.

POINT III

CONTESTING THE CONDEMNOR'S VALUATION DATE IS A DEFENSE UNDER U.C.A. §78-34-9

Respondents claim that the change in valuation date relates to just compensation and is not a defense. Under Friberg, supra, however, it is clear that the proponent has the burden of proof to change the valuation date. It should be obvious from U.R.C.P. 8 that if one has the burden of proof and that burden of proof is placed on the Defendant, as is the case here, then the Defendant should raise it as a defense in their response to the Complaint. Here the Defendants did not raise it in their response to any of the subject Complaints and, in fact, not even at the time of the hearing on the immediate occupancy issue. Not only was this defense not properly raised, but since it is a defense to a taking being alleged in 1987, withdrawing the funds at immediate occupancy, waives the defense under U.C.A. §78-34-9.

Respondents raise a public policy argument for encouraging the withdrawal of funds from the Court. The public policy argument regarding this issue is in favor of UDOT. The public policy should be that if the condemnee believes that the valuation date is in error, the condemnee should raise that issue no later than the determination by the court that the condemnor

has made a good faith appraisal of the value of the property, submitted it to the court, and therefore entitled to occupancy. If the valuation date is in error, discovering it early allows the appraisers on both sides to properly appraise the properties and hopefully settle the valuation dispute between the parties. When the money is withdrawn from the court after the immediate occupancy hearing, the condemnor should have the right to rely upon U.C.A. §78-34-9 and be assured that the condemnee will not later contend that the condemnor already "de facto possessed" the property previously and its complaint and appraisal for purposes of immediate occupancy are based on an improper taking date. Certainly, when a condemnor's complaint alleges the need to take property and alleges a certain value, the condemnee's merely contesting the value does not inform the condemnor that a claim exists for a previous "de facto" taking.

U.R.C.P 12 (b) characterizes a "defense" as including counterclaims. Thus, even if a claim for inverse condemnation or a previous "de facto" taking is a counterclaim to a complaint for condemnation it nevertheless is a "defense" and it therefore is waived if the funds are withdrawn upon immediate occupancy. If the condemnee wished to draw upon the deposited funds, but did not wish to waive the defense of a previous "defacto taking", then the condemnee should have requested a stipulation from the condemnor that the order of immediate occupancy include a

provision that this defense is not waived.

POINT IV

RESPONDENTS ARE BARRED BY STATUTE OF LIMITATIONS AND GOVERNMENTAL IMMUNITY ACT FROM RAISING 1977 "DEFACTO TAKING" ALMOST TEN (10) YEARS LATER

Respondents do not contend that they raised their contention of "defacto taking" in 1977, within the limits of any statute of limitations or that they filed a claim under the Utah Governmental Immunity Act. On Pages 62-63 of Respondents' Brief, they state that:

> UDOT asserts that it could not have instituted condemnation proceedings in 1977 or 1978 since the design was not fully completed, nor were funds made available. The landowners accept that. By the same token, the landowners could not have instituted inverse condemnation actions. An action by either party would have been premature, even though the corridor had been selected and the landowners' properties held hostage. Respondents Brief, Pages 62-63 (emphasis added).

The flaw in Respondents argument is obvious. They claim their land was held hostage in 1977 or 1978. They claim that UDOT and the landowners could not have instituted any action in 1977 or 1978. If the land was held hostage in 1977 or 1978 an actionable claim arose then. The Respondents did not file a claim then because there was not a "defacto taking" in 1977-1978. If such a defacto taking did occur then, a notice of claim under the Governmental Immunity Act and action within the period of any

applicable statute of limitations should have been filed.

The Utah Supreme Court in Walton v. State Road Commission, 558 P.2d 609 (Utah 1976), held that the Utah Governmental Immunity Act applied to a case of inverse condemnation alleging the taking of access. Respondents analysis of this case is simply incorrect. Respondents claim that Walton:

> does not involve the condemnation of private property. ... There was not a taking that would have required the filing of eminent domain proceedings. An inverse condemnation action would have been the only manner in which the matter could have been brought before the court. Respondents' Brief, Pages 65-66.

Obviously, if an inverse condemnation claim is actionable, then the government should have been able to file a condemnation claim up front. In fact, an inverse condemnation claim is based upon the government's failure to file a condemnation action when it should have. See State v. Hollis, supra, at 751, wherein the Arizona Supreme Court states that:

> The remainder of the Complaint alleges that the State, without instituting condemnation proceedings, appropriated the plaintiffs' access right to their property and otherwise damaged the property by the acts of its agent. The complaint therefore states a cause of action on the theory of inverse eminent domain.

Hollis, also necessarily concluded that a condemnation action can be maintained for the taking of a property owner's access rights. Respondents cite no law that prohibits the government from filing a condemnation case for the taking of access. There is no reason to believe that the Walton court would not have applied the same

analysis to a "defacto taking" such as the one Respondents contend herein.

Respondents cite a Nevada case, City of Sparks v. Armstrong, 748 P.2d 7 (1987) in an attempt to bolster their argument. However, Sparks does not discuss any governmental immunity act and does not discuss Utah's statute of limitations. In reading the Sparks case, it is clear that a governmental immunity act is not discussed. A statute of limitation defense is discussed only after it is concluded that the case does not involve an inverse condemnation claim without any explanation that would aid as to whether it is applicable to the facts of the subject case here. Appellants respectfully request that your court follow the logical reasoning of the Utah court in Walton and not the uncertain reasoning of the Nevada court in Sparks.

Respondents are also incorrect about the inapplicability of the public policy reasons for the governmental immunity act applying to this case. If Respondents did feel that their land was held "hostage" in 1977-78, the filing of a notice of claim would have served the purpose of alerting the State of Utah to the concerns of the landowners. The government, upon receiving the notice of claim, could have instituted condemnation proceedings if certain conditions were met; determined that there was no actionable governmental intrusion; or ceased any

actionable intrusive activities. Of course, the land was not held "hostage" then and no notice of claim was filed.

Respondents then assert that Salt Lake v. Ramoselli, 567 P.2d 182 (Utah 1977) aids their cause. Ramoselli indicates that the State can not condemn without funding approved for the subject project. In this case, as discussed previously, funding was not approved until December, 1985. What the Supreme Court indicated in Ramoselli that UDOT can not do directly (file a condemnation action prior to funding), it should not be able to do indirectly (have a valuation date prior to the funding date). If precondemnation activities of UDOT were (and they were not in this case) holding the landowners' properties hostage prior to UDOT having funding for the subject project in 1985, the landowners could have successfully enjoined such actions as being in violation of the Ramoselli case.

CONCLUSION

This is not intended to be a "findings" appeal, but rather an interlocutory appeal requested for the purpose of guiding the trial court in the application of law to the facts of this case. The law simply does not allow for the valuation date to be changed from 1987 to 1977 based upon the evidence in the record. Respondents did not timely raise the valuation date issue, both under the Governmental Immunity Act and any applicable Utah statute of limitations. Respondents

withdrew the funds deposited for immediate occupancy and as a result, waived the consideration of the defense claim of a defacto taking in 1977. The undisputed evidence indicates that UDOT could not, and did not, unequivocally commit to condemnation of the subject properties until no earlier than December, 1985, when funding was obtained. The law is also clear that since UDOT did not occupy or enter the subject properties in 1977, that interest can not commence back then.

Even if Respondents did properly raise the valuation date issue and could show that the properties were subjected to unreasonable intrusions in 1977, Respondents have failed to present any credible evidence before the trial court that their was a significant change in fair market value of the subject properties from 1977 to 1987 in order to invoke a change in valuation date under Friberg, supra.

Based upon the foregoing, the dates of valuation in these subject cases should be the service of summons and interest should commence to run from and after the dates the trial court granted the applicable Order of Immediate Occupancy.

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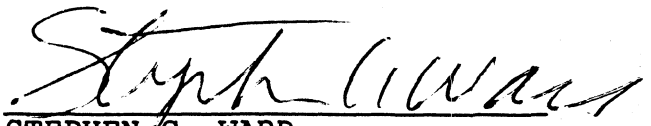

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CERTIFICATE OF MAILING

This is to certify that four copies of the foregoing Reply Brief of Appellant was mailed first class, postage prepaid this 26th day of January, 1990 to the following:

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